

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   EDITH JONES, ET AL., ON BEHALF :

4   OF HERSELF AND A CLASS OF :

5   OTHERS SIMILARLY SITUATED, :

6                   Petitioners :

7           v. :   No. 02-1205

8   R.R. DONNELLEY & SONS CO. :

9   - - - - -X

10                                   Washington, D.C.

11                                   Tuesday, February 24, 2004

12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:24 a.m.

15 APPEARANCES:

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17 the Petitioners.

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20 behalf of the United States, as amicus curiae,  
21 supporting the Petitioners.

22 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of  
23 the Respondent.

24 KEVIN C. NEWSOM, ESQ., Solicitor General, Montgomery,  
25 Alabama; on behalf of Alabama, et al., as amici

1 curiae, supporting the Respondent.  
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P R O C E E D I N G S

(10:24 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in No. 02-1205, Edith Jones v. R.R. Donnelley & Sons.  
Ms. Gorman.

ORAL ARGUMENT OF H. CANDACE GORMAN  
ON BEHALF OF THE PETITIONERS

MS. GORMAN: Mr. Chief Justice, and may it  
please the Court:

Congress answered the call of the judiciary by  
enacting section 1658, a bright line rule that provides a  
default statute of limitations of 4 years for any civil  
action arising under an act of Congress after December  
1st, 1990.

Section 1658 applies to plaintiff's claims  
because this Court said in Patterson that plaintiff did  
not have claims of racial harassment and -- and  
termination and discharge claims.

Plaintiff's claims arise under the 1991 Civil  
Rights Act because that is the act that created the cause  
of action that plaintiff has filed under.

In Rivers, this Court held that the 1991 act, as  
amended by the 1991 Civil Rights Act, was a new cause of  
action that created new liabilities and a new standard of  
conduct. Therefore, under section 1658, under the plain

1 meaning of that statute, the 1991 Civil Rights Act  
2 applies.

3 The simple one-sentence statute has been  
4 interpreted in such a way as to give it no meaning. The  
5 terms, arising under, and the term, civil action, are  
6 simple terms used by this Court repeatedly to describe the  
7 statute's reach and that reach includes all civil actions  
8 arising under an act of Congress after December 1st, 1990,  
9 whether it has roots in or references preexisting law.

10 QUESTION: Ms. Gorman, one of the anomalies that  
11 if -- if you are complaining about a refusal to hire, a  
12 discriminatory refusal to hire, the limitation would be 2  
13 years, but if you're complaining about a discriminatory  
14 firing, it would be 4 years. Does that make sense to --  
15 to have those two claims both stemming from the original  
16 1981, but one having extended it?

17 MS. GORMAN: Yes. I -- I believe it does, Your  
18 Honor, and the reason is that the purpose of section 1658  
19 is to cut down on borrowing and State limitations periods  
20 that have been used for the borrowing purposes, and  
21 anything that cuts down on those purposes of borrowing is  
22 going to be going to the effect of that statute.

23 Now, the fact that there are two statutes of  
24 limitations is not unusual in -- in the discrimination  
25 cases that I file. There are often many statutes of

1 limitations that someone has to look at. For example, in  
2 the Age Discrimination Act, there are two statutes of  
3 limitations for willful and not willful. Often claims are  
4 filed under section -- under title VII, as well as under  
5 section 1981, and we have various statutes of limitations  
6 that we deal with in those claims as well.

7 QUESTION: But one can see some rhyme or reason  
8 to those differences. Here it seems that -- that one  
9 claim is -- is no more deserving of a longer time than the  
10 other.

11 MS. GORMAN: Well, we have to look at the plain  
12 meaning of the statute, Your Honor. And it is a default  
13 statute of limitations, so Congress has the option at any  
14 time of creating a -- a statute of limitations going back  
15 to 1981 if it thinks that this is not the way it wanted it  
16 to work out. But it -- the statute is clear that it's for  
17 all new causes of action or for all causes of action that  
18 arise under acts of Congress after December 1st, 1990, and  
19 I think it's very clear that plaintiffs' claims did not  
20 arise until the 1991 Civil Rights Act. Plaintiffs could  
21 not file a cause of action until that 1991 Civil Rights  
22 Act.

23 QUESTION: Do you want us to interpret this  
24 section (b) as a new cause of action, in other words?

25 MS. GORMAN: The 1991 act. The claims -- I'm

1     only addressing the narrow issue --

2                 QUESTION:   Yes.

3                 MS. GORMAN:  -- of the claims that plaintiff  
4     could not file prior to --

5                 QUESTION:  Section (b).  You -- you want us to  
6     interpret section (b) as a new cause of action?

7                 MS. GORMAN:  Correct.  And I believe that  
8     follows from the Court's decisions both in Patterson and  
9     in Rivers.

10                QUESTION:  If -- if you completely untie section  
11   (b) from section (a), number one, it doesn't make any  
12   sense, and number two, the -- the implied cause of action  
13   that we have found might disappear because we have told  
14   Congress, when you enact a new cause of`action -- or a new  
15   statute, you have to say explicitly if it creates a  
16   private cause of action.

17                MS. GORMAN:  I believe Congress addressed that  
18   in the 1991 Civil Rights Act, codifying that this was a --  
19   that there was a private right of action involved.  But  
20   this Court had already --

21                QUESTION:  Where -- does it say that in 1981?

22                MS. GORMAN:  In 1981(c).

23                QUESTION:  Well, I -- I'm not sure I read it  
24   that way.

25                MS. GORMAN:  The rights protected by this

1 section are protected against impairment by nongovernment  
2 discrimination and impairment under color of law.

3 QUESTION: That doesn't sound like an explicit  
4 creation of a cause of action to me.

5 MS. GORMAN: Well, Your Honor, this Court had  
6 also said in Patterson that 1981 did create a private  
7 right of action.

8 QUESTION: Well, that's what -- but that was  
9 under 1981. You're saying it's a new cause of action, and  
10 I'm saying that if it's a new cause of action, then  
11 Congress has to be explicit that there's a private cause  
12 of action.

13 MS. GORMAN: I believe the language in section  
14 (c) was put in there just to confirm that what the Court  
15 said in Patterson, that this was a private right of  
16 action, was going forward with the new statute.

17 And to the point that this is definitional,  
18 which I think was what you were also raising, Justice  
19 Kennedy, the fact that Congress adds definitions to create  
20 causes of action was recognized by this Court in Rivers as  
21 a way that Congress often creates causes of action. So I  
22 believe that that's very consistent with how this -- how  
23 Congress enacts causes of action.

24 QUESTION: Your -- your argument really rests on  
25 the proposition that arising under has a -- a uniform



1 meaning, that it doesn't acquire different meanings in  
2 different contexts, doesn't it?

3 MS. GORMAN: I believe it rests on the  
4 proposition that the most common way of meaning -- using  
5 arising under is the way Justice Holmes described it and  
6 that's that a suit arises under the law that creates the  
7 cause of action. And that's what we're saying here, that  
8 this suit relies on the 1991 law. That's what created  
9 plaintiff's cause of action.

10 QUESTION: Well, we've -- we've also held that  
11 -- that arising under embraces not just a -- a Federal  
12 cause of action but even State causes of action that  
13 require determination of a Federal question for which the  
14 Federal question is -- is sort of essential. Now, how  
15 could you possibly apply that meaning to this statute? It  
16 would mean that the Federal Government would be  
17 establishing statutes of limitation for State causes of  
18 action.

19 MS. GORMAN: I don't believe that's how the  
20 statute was -- was drafted, Your Honor. The Eleventh  
21 Amendment does not place any limitation on Congress'  
22 ability to establish a Federal statute of limitations for  
23 a Federal claim, and I believe section 1658 is clearly  
24 directed to Federal causes of action, Federal civil  
25 actions, not to State civil actions.

1           QUESTION: Not if you use arising under the way  
2 we use it in other contexts where -- where it -- a claim  
3 can -- can be thought to arise under, for purposes of --  
4 of Federal court jurisdiction, even though the cause of  
5 action is -- is a State cause of action.

6           MS. GORMAN: Your Honor, I believe arising under  
7 in this sense should be used in the way that it's most  
8 used by this Court and in the way that it's used in title  
9 28, which is where this statute was -- is codified. As  
10 Justice Frankfurter said, you -- you take the soil along  
11 with it, that goes along the other statutes. So the fact  
12 that this Court has repeatedly and consistently said in  
13 title 28 that a cause of action arises under the law that  
14 creates the cause of action or if it depends -- depends on  
15 that cause of action. I believe that's the -- the way  
16 arising under should be used in this case as well.

17           QUESTION: All right. So you're picking one of  
18 various -- various meanings, but that's all that the other  
19 side is doing too.

20           MS. GORMAN: But I believe this is the more  
21 consistent approach with how this Court has looked at  
22 arising under in the -- in the jurisdictional context  
23 because that is where this Court -- that is where Congress  
24 has placed this definition in the statute.

25           QUESTION: I don't think so. I think in cases

1     such as Smith v. Kansas City Title & Trust Company, we've  
2     -- we've said that arising under jurisdiction includes  
3     where the cause of action is based on State law, but  
4     relief necessarily depends on resolution of a substantial  
5     question of Federal law. We say that Federal courts can  
6     take jurisdiction in that situation.

7             And as I say, if you apply that meaning here, it  
8     -- it means that you're -- you're setting a Federal  
9     statute of limitations for State causes of action unless  
10    you want to disown Smith v. Kansas City and that line of  
11    cases.

12            MS. GORMAN: Your Honor, what I'm suggesting is  
13    that the -- the reasoning of this Court has been  
14    consistently that under title 28, arising under has been  
15    used as Justice Holmes has suggested it, and that's what  
16    I'm suggesting is the -- is the bright line rule that this  
17    Court should follow in this case.

18            QUESTION: I'm suggesting that's wrong.

19            MS. GORMAN: I understand, Your Honor.

20            QUESTION: What do you do with the hypothetical  
21    that was raised in -- in the briefs on the other side that  
22    suppose Congress shrinks the people who are exempt from  
23    title VII, say, and makes it 15 or more employees instead  
24    of 25 or more employees? Then what do you do with the  
25    people who are newly included? Do they get a longer

1 statute than the ones who were there before?

2 MS. GORMAN: Yes, Your Honor, I believe they do.  
3 And again, I want to point out that this is a default  
4 statute of limitations, so Congress would always have the  
5 ability to affix a statute of limitations.

6 QUESTION: But -- but in -- in determining what  
7 Congress meant, is it -- wouldn't it be relevant that that  
8 seems something no legislature would want to have happen,  
9 that people who are newly covered by the same prescription  
10 get more time to sue than people who have always been  
11 covered?

12 MS. GORMAN: Your Honor, first that example  
13 comes from title VII which does have its own --

14 QUESTION: I know. I know. So we had to pick  
15 one that comes under 1981 or 1982.

16 MS. GORMAN: I still think we have to give the  
17 plain meaning of the -- of the statute its effect, and  
18 Congress -- we have to understand that Congress set this  
19 as a default and if Congress does not want to have this  
20 anomaly where people who are between 15 and 25 employees  
21 in a -- in an employment relationship where it's under 25  
22 employees and now a cause of action has been created for  
23 them -- if Congress does not want to have that situation,  
24 then Congress is going to have to draft a statute of  
25 limitations which that -- with that law, which Congress

1 has shown under the Sarbanes-Oxley Act that it is more  
2 than willing and able to do.

3 When Congress adopted -- when Congress amended  
4 the Telecommunications Act of 1936 to add the Sarbanes-  
5 Oxley amendment, it put in the statute of limitations that  
6 it knew it wanted to have so it would be consistent with  
7 other statute of limitations within that statute. And it  
8 is clear from the reading of that statute, that if  
9 Congress -- that Congress thought if they had not put in  
10 that amendment, that the 4-year statute of -- of  
11 limitations would apply even though that was an amendment  
12 to a preexisting statute.

13 QUESTION: Another problem that was raised in  
14 the brief on the other side was what would you do with a  
15 circuit that had a law -- that it had interpreted the law  
16 as allowing no claim and there's a circuit where other  
17 circuits have -- have allowed a claim in the -- and we  
18 haven't spoken. In the circuit that said there was no  
19 claim and then -- so that people are newly covered --  
20 suppose Congress eliminates that circuit split and it  
21 makes it clear that everybody is covered. Then what  
22 happens in the circuit where people were not covered until  
23 Congress clarified the law? Do they get the 4 years?

24 MS. GORMAN: I believe in most cases I think  
25 everyone will get 4 years, and the reason I say that is

1     because section 1658 does not address the circuit --  
2     circuit split. It addresses the statute that's enacted by  
3     Congress. So if Congress enacts the statute setting forth  
4     a cause of action that was not codified before, then I  
5     believe that that 4-year statute of limitations would  
6     apply.

7             QUESTION: Well, but that -- that's the issue,  
8     whether it was codified before. Some circuits say it was  
9     already there. Other circuits say it wasn't there. For  
10    the latter circuits, this would be a new creation of a  
11    cause of action. For the former, it would not. Now, I  
12    agree there's only one right answer; either -- either it  
13    existed under the old law or it didn't exist under the old  
14    law.

15            But frankly, I don't want to have to sit here  
16    and resolve -- resolve questions of whether something  
17    existed under an old law for no purpose except to decide  
18    whether -- whether this statute of limitations provision  
19    cuts in or not. I mean, it's a weird thing to have us  
20    doing, deciding whether a statute was really merely  
21    reaffirming an old law or whether it was enacting a new  
22    cause of action. I --

23            MS. GORMAN: I -- I think one thing that we  
24    would always be able to do is to look at these statutes.  
25    Since we're looking at this in the abstract, it's hard to

1 say. But -- but taking the -- the 1991 statute, for  
2 example, where Congress defines it in the purpose as  
3 expanding the rights, then I think it's clear that this is  
4 something new that did not exist before. So I think --

5 QUESTION: But in -- in --

6 MS. GORMAN: I'm sorry.

7 QUESTION: I'm sorry. I didn't mean to cut you  
8 off.

9 I was -- in the case of the circuit split, I  
10 thought the statute that broke -- that -- that resolved  
11 the circuit split and confirmed that there was a cause of  
12 action would -- would qualify on your theory of arising  
13 under because your -- your cause of action would, in part,  
14 be based upon the amending statute. Am I wrong?

15 MS. GORMAN: No. That's correct, Your Honor.

16 QUESTION: Okay.

17 MS. GORMAN: That is what I'm suggesting.

18 QUESTION: Well -- well, it has to --

19 QUESTION: But what about the circuit that  
20 already recognized the cause of action? May I repeat my  
21 question?

22 Say that -- prior to the statutory amendment,  
23 the Seventh Circuit had already recognized the cause of  
24 action that the amendment confirmed. Now, would it be a  
25 new cause of action in the Seventh Circuit?

1 MS. GORMAN: I don't think it would be a new  
2 cause of action but it would now be arising under an act  
3 of Congress that was enacted after 1900, and I think --

4 QUESTION: But the Seventh Circuit thought it  
5 arose under an act of Congress even before the amendment.

6 MS. GORMAN: I understand, Your Honor, but I  
7 think if you look at the purpose of the statute and if we  
8 use Patterson as an example, in Patterson the Court said  
9 there was no claim under 1981 for post-contract claims.  
10 And then when Congress enacted the 1991 act, if -- if --  
11 I'm sorry. Patterson had not been decided by this Court,  
12 but we had circuits in a disarray on this issue and then  
13 Congress enacted the 1991 act and said in there we are  
14 expanding --

15 QUESTION: Oh, I see.

16 MS. GORMAN: -- and defining. Then I believe  
17 that the 4-year statute would apply.

18 And if I may, Your Honor, I'd like to reserve  
19 the remainder of my time.

20 QUESTION: Very well, Ms. Gorman.

21 MS. GORMAN: Thank you.

22 QUESTION: Mr. Garre, we'll hear from you.

23 ORAL ARGUMENT OF GREGORY G. GARRE

24 ON BEHALF OF THE UNITED STATES,

25 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS



1 MR. GARRE: Thank you, Mr. Chief Justice, and  
2 may it please the Court:

3 Petitioners' claims for racial discrimination in  
4 the terms and condition of employment are subject to the  
5 uniform statute of limitations set forth in 28 U.S.C. 1658  
6 because those claims were created by and therefore arise  
7 under the Civil Rights Act of 1991, an act of Congress  
8 enacted after December 1 --

9 QUESTION: Mr. Garre, as has already been  
10 pointed out, the interpretation does give rise to some  
11 anomalies and interpreting it the other way might as well.  
12 What could Congress have provided in section 1658(a) to  
13 avoid some of these questions?

14 MR. GARRE: Well --

15 QUESTION: How could it have been written --

16 MR. GARRE: Justice --

17 QUESTION: -- so we wouldn't be in this mess?

18 MR. GARRE: Justice O'Connor, I think some of  
19 the -- the issues that have been identified to the Court  
20 are a direct product of the compromise that Congress  
21 struck in 1990. Originally the act, as proposed by the  
22 Federal Courts Study Committee, would have applied a  
23 uniform statute of limitations to all existing causes of  
24 action. And some Members of Congress and groups believed  
25 that that would create retroactivity concerns. So the --

1 the compromise that was adopted was that the uniform  
2 statute of limitations would apply on a going-forward  
3 basis with respect to causes of actions that were created  
4 by acts of Congress enacted after December 1990.

5 This case involves precisely such a cause of  
6 action. Petitioners' claims we know from the Patterson  
7 case were not actionable under statute 1981 prior to the  
8 1991 Civil Rights Act. The only reason petitioners are in  
9 Court today and have viable claims is because of the 1991  
10 Civil Rights Act. Therefore, we think that respondent's  
11 position which results in the conclusion that petitioners'  
12 claims arise under the -- the same statute at issue in  
13 Patterson, the statute that we know does not create those  
14 claims, is an absurd conclusion that we think counsels  
15 against their position.

16 QUESTION: What if the statute did create those  
17 claims? I mean, I'm getting back to the circuit split  
18 question.

19 MR. GARRE: We --

20 QUESTION: It seems to me you don't give the  
21 same answer that -- that the petitioner does.

22 MR. GARRE: Justice Scalia, we think that the  
23 circuit split problem would be resolved for purposes of  
24 section 1658 the same way it would be resolved for  
25 retroactivity purposes. Anytime Congress creates a new

1 cause of actions, there -- there are going to be questions  
2 that arise from the creation of that cause of action.

3 The Court considered the same question in Hughes  
4 Aircraft v. United States ex rel. Schumer where Congress  
5 amended the False Claims Act to eliminate a jurisdictional  
6 defense, and this Court said, on pages 949 and 950 of its  
7 opinion, created a new cause of action. And therefore,  
8 the Court held that cause of action cannot be  
9 retroactively applied.

10 QUESTION: So you're saying we -- we will have  
11 to resolve these -- these circuit splits for no purpose  
12 whatever except to decide whether the statute of  
13 limitations applies. Right? We'll have to --

14 MR. GARRE: No, Justice Scalia. In the sense  
15 that the same issue would -- would arise for retroactivity  
16 purpose, whether or not Congress has created a new cause  
17 of action which would apply retroactivity -- retroactively  
18 or not. And even if the retroactivity question didn't  
19 arise, that's a product of the statute that Congress has  
20 drawn.

21 Another -- another problem with respondent's  
22 construction --

23 QUESTION: As you interpret it.

24 MR. GARRE: As we interpret it, and we think  
25 that that is the plain meaning of Congress' use of both

1 the -- the all-inclusive term, the traditionally inclusive  
2 term, arising under, as well as Congress' reference to an  
3 act of Congress.

4 QUESTION: What -- what is your position as to  
5 whether the statute of limitations applies to State causes  
6 of action?

7 MR. GARRE: We don't think it applies to State  
8 causes of action at all.

9 QUESTION: Then you're not using the all-  
10 inclusive term, arising under.

11 MR. GARRE: Well, that's not a product that  
12 Congress has used of arising under. It's a question of  
13 whether Congress intended to supply a Federal statute of  
14 limitations for State claims.

15 QUESTION: Well, and -- and you say they didn't  
16 because -- so your -- since it's absurd to think they did  
17 that, you're -- you're giving arising under a narrower  
18 interpretation than -- than we give it for --

19 MR. GARRE: Well --

20 QUESTION: -- for purposes of -- of Federal  
21 jurisdiction.

22 MR. GARRE: In the first place, we think that  
23 plaintiffs' claims arise under the 1991 Civil Rights Act  
24 under any definition of arising under, dictionary  
25 definition, the statutory definition, and 28 U.S.C.

1 1331 --

2 QUESTION: But -- but that contradicts your  
3 other position that -- that we're going to have to resolve  
4 this question in order to determine the circuit splits  
5 because if you believe that, your -- your answer would be  
6 the same as -- as the petitioners. You don't have to  
7 resolve those circuit splits so long as there's a later  
8 statute. It arises under the State -- under the later  
9 statute. Whether it arises under both, who cares?

10 MR. GARRE: No.

11 QUESTION: That's not your position.

12 MR. GARRE: The question would be the same  
13 question that this Court considered in the Rivers case  
14 which was whether or not Congress created new causes of  
15 action in the 1991 Civil Rights Act, and the Court  
16 analyzed that question by looking to Congress' intent  
17 enacting that act. Some parties argued that Congress had  
18 simply clarified and continued into effect old rights.  
19 Other parties argued that Congress had created new rights,  
20 and this Court agreed with that interpretation. And we  
21 think that that interpretation requires the conclusion in  
22 this case that petitioners' claims are governed by the  
23 statute of limitations in section 1658.

24 If I could refer to another problem with  
25 respondent's construction and that is it -- it essentially

1 renders inoperative the default rule established by  
2 Congress in section 1658 in the vast majority of cases,  
3 and that's because Congress rarely creates the kind of  
4 wholly new and self-contained cause of action that has no  
5 reference to or roots in Federal law. And that's the only  
6 time that the default rule, which Congress thought was a  
7 significant improvement to the prior practice of State --  
8 borrowing State statute of limitations would apply under  
9 -- under respondent's -- under respondent's  
10 interpretation.

11 QUESTION: Well, it did so in the Truth in  
12 Lending Act and -- and the Clean Air Act and the Clean  
13 Water Act. Those are all new enactments.

14 MR. GARRE: But -- but, Justice Kennedy,  
15 Congress often chooses to -- to build upon existing  
16 Federal law in creating causes of action.

17 QUESTION: Well, in this case, what about the  
18 problem with the implied cause of action? I don't read  
19 section (c) as explicitly granting a -- a private cause of  
20 action.

21 MR. GARRE: We think -- from our understanding  
22 of section (c), it was intended to clarify that section  
23 1981 does create a private right of action, which -- which  
24 this Court had held in Runyan and reaffirmed in Patterson.

25 But we don't think it's a problem if the Court

1 concludes that petitioners' claims depend on both  
2 subsection (a) of 1981 and subsection (b) of 1981 because  
3 petitioners' claims only exist today because of the 1991  
4 act, in that respect, arise under that act, under the  
5 dictionary definition of arising under and under the  
6 settled definition of arising under that Congress uses in  
7 title 28 of the United States Code.

8           Petitioner seems to read the statute's reference  
9 to an act of Congress to refer only to an act of Congress  
10 that creates the kind of wholly new self-contained cause  
11 of action I mentioned.

12           QUESTION: You mean respondent, yes.

13           MR. GARRE: Respondent. You're right, Mr. Chief  
14 Justice.

15           But we think, as -- as Judge Alito concluded in  
16 his dissenting opinion in the Zubi case, that an act of  
17 Congress is just as naturally read and has to be read to  
18 include an act of Congress that creates a cause of action  
19 by amending an existing cause of action.

20           And all of respondent's objections about the  
21 practicality of our position, which we think is -- is the  
22 plain-meaning position of what Congress -- the statute  
23 that Congress wrote, have to be weighed against the  
24 intractable problems that this Court and the Federal  
25 Courts Study Committee identified with respect to the past

1 practice of borrowing State statutes of limitations.

2 Our inquiry focuses the analysis exclusively on  
3 Congress' actions and Federal law, and we think that  
4 that's where Congress wanted the courts to focus. The  
5 prior practice focused the inquiry on State law. It  
6 required Federal courts to canvas State law, to identify  
7 an analogous State cause of action, and then to try to  
8 identify the statute of limitations that would apply in  
9 the State to that cause of action, and then to make a  
10 separate determination whether that State statute of  
11 limitations could appropriately be applied to Federal law.  
12 And that had created great uncertainty and great disparity  
13 in the application of Federal law. Indeed, under the old  
14 practice, a single Federal claim could be subjected to 50  
15 different State statutes of limitations.

16 And that was the problem that Congress was  
17 addressing at the -- the recommendation of the Federal  
18 Courts Study Committee in enacting section 1658. And it  
19 decided, as a result of the compromise, to apply it only  
20 on a going-forward basis with respect to new claims that  
21 were created by Congress after 1990.

22 Petitioners' claims only exist today as a result  
23 of Congress' action in the 1991 act, and we think they're  
24 clearly governed by the default statute of limitations  
25 established by section 1658.



1           As petitioners' counsel made clear, section 1658  
2   is only a default rule. Congress can always specify a  
3   different rule and it has done so several times since  
4   1990. It did so in the Sarbanes-Oxley Act of -- of 2002,  
5   and that's significant because that act, Sarbanes-Oxley,  
6   amending an existing cause of action under the Securities  
7   and Exchange Act -- so if -- if Congress had in mind the  
8   interpretation of section 1658 that respondent proposes,  
9   it's certainly odd that Congress felt obliged to amend  
10  1658 to put in the special statute of limitations for  
11  securities laws claims.

12           QUESTION: What was the period prescribed in the  
13  Sarbanes-Oxley statute?

14           MR. GARRE: It's 2 years after the discovery of  
15  facts and 5 years after the violation, which is different  
16  than the 4-year rule established by Congress in section  
17  1658(a).

18           We think the court of appeals in this case erred  
19  in subjecting petitioners' section 1981 claims, which only  
20  exist because of the 1991 Civil Rights Act, to the old  
21  borrowing practice that Congress sought to put an end to  
22  in 1990, and we think that this Court should hold that  
23  those claims are governed by the uniform statute of  
24  limitations established by section 1658.

25           QUESTION: Will there be some retroactivity

1 problems if some States have 6-year statute of limitations  
2 and this reduces that period?

3 MR. GARRE: No. As -- as Judge Alito explained  
4 in his -- may I answer that question?

5 QUESTION: Yes.

6 MR. GARRE: As Judge Alito explained in the Zubi  
7 dissent, there's no retroactivity problems because the  
8 only expectation that a plaintiff could have after  
9 Congress created the new causes of action in 1991 is if  
10 those causes of actions would be subject to the default  
11 statute of limitations specified.

12 QUESTION: Thank you, Mr. Garre.

13 MR. GARRE: Thank you.

14 QUESTION: We'll hear now from Mr. Phillips.

15 ORAL ARGUMENT OF CARTER G. PHILLIPS

16 ON BEHALF OF THE RESPONDENT

17 MR. PHILLIPS: Thank you, Mr. Chief Justice, and  
18 may it please the Court:

19 It seems to me that there are two propositions  
20 that arise out of the conversation of the past 25 minutes.

21 First of all, there is no single uniform meaning  
22 of the -- of the expression, arising under. It is not a  
23 term of art. It is a term of chaos. It is a -- it is a  
24 phrase that is used repeatedly in different contexts,  
25 routinely used with a very pragmatic -- in a very

1 pragmatic fashion and does not answer the question whether  
2 or not Congress, when it adopted 1658, or Congress, when  
3 it amended section 1981, really envisioned this kind of  
4 expansive interpretation that would allow an argument to  
5 be made that State laws are suddenly subject to statutes  
6 of limitations. As Justice Scalia asked, when you make  
7 other kinds of adjustments in these schemes, are you going  
8 to have to resolve every -- every one of these issues?

9 I mean, the question with respect to the split  
10 in the circuits. There is currently pending a proposed  
11 change to the Air Carriers Access Act that specifically  
12 resolves the conflict in the circuits between the Eleventh  
13 Circuit which says there is no cause of action and other  
14 circuits that says there is a cause of action.

15 These aren't hypotheticals. These are real  
16 issues and if this Court is not careful in how it tries to  
17 confine the interpretation of section 1658, it's going to  
18 be interpreting the statute for the better part of the  
19 next 10 years, which may be good news for me as a  
20 practitioner before the Court. But I'm quite certain that  
21 it's not good news either for my clients, for the lower  
22 courts that are going to have to adjudicate these problems  
23 or for --

24 QUESTION: The solution to the last problem you  
25 raised offered by the petitioner is simply you use the

1 newer statute, and you don't have to look into the  
2 question of -- of which side of the circuit conflict was  
3 correct. If the right is created by the new statute, it  
4 didn't matter whether it -- if it's affirmed by the new  
5 statute, you're suing under the new statute, it doesn't  
6 matter whether it existed before or not. Why isn't that  
7 an adequate solution?

8 MR. PHILLIPS: Well, it might be an adequate  
9 solution, Justice Scalia, except that it's not self-  
10 evident from the language, arising under. The question is  
11 what -- what is the use of arising under that you're going  
12 to try to apply in a more or less uniform fashion.

13 QUESTION: But I think isn't her answer to the  
14 -- to the fact that it isn't self-evident from the  
15 language alone an answer she gave to a separate question,  
16 and that is that it's the policy of Congress to apply the  
17 -- the 4-year rule when it can so that if in doubt -- if  
18 the language allows but doesn't compel, then the answer  
19 would be apply the new statute because that is going to  
20 get to the congressional objective of getting the 4-year  
21 statute as broad --

22 MR. PHILLIPS: And there -- and I don't think  
23 there's support for that objective in -- in this  
24 particular statute because if Congress really meant --

25 QUESTION: Well, isn't the -- isn't the support

1     that they started out by intending to -- to apply the 4-  
2     year period, I mean, across the board and they -- they  
3     only fell back out of fear of -- of violating reliance  
4     interests which would say the -- the objective is still to  
5     get the broadest possible application?

6             MR. PHILLIPS: Well, no. It's a question of --  
7     I mean, they -- they obviously made a -- a compromise, but  
8     the question is why isn't it as reasonable a compromise to  
9     say, look, we're going to deal with this in the truly  
10    classic sense of the word prospective. Every new self-  
11    contained statute that goes into effect is now subject to  
12    this rule. And -- and literally, as Justice Kennedy  
13    said --

14            QUESTION: They could --

15            MR. PHILLIPS: -- they do that every day.

16            QUESTION: -- they could have said that, but the  
17    -- the counter-argument to -- to what you've just said is  
18    -- and -- and maybe this is -- I hope you'll comment on  
19    this, that on your reading, the 4-year statute is -- is  
20    rarely going to be applied simply because there -- there  
21    aren't very many sort of absolutely brand-new,  
22    freestanding, self-contained causes of action. Most of  
23    them are -- are subjects of tinkering from time to time.

24            MR. PHILLIPS: Well, Justice Souter, the -- the  
25    reality is that this is far more common than you think.

1 The anti-terrorism statute has specific standalone causes  
2 of action. The Muhammad Ali Reform -- Boxing Reform Act  
3 has a standalone cause of action. I mean, there are, in  
4 fact a host of statutes in which Congress does precisely  
5 what the other side claims it rarely does. I mean, this  
6 -- if -- if the Court would like us to provide a list,  
7 we'd be happy to do it.

8 QUESTION: Yes, but the argument is the other  
9 way. I mean, it's that very often major pieces of  
10 legislation are enacted in the form of what looks like an  
11 amendment of a current statute. I think of the Celler-  
12 Kefauver Act. I mean, on your theory, all of merger law  
13 would really be viewed as not a new statute when it was  
14 totally new. There were no merger cases to speak of prior  
15 to Celler-Kefauver. And then they come in and section 7  
16 applies to assets and all of a sudden you have merger law.  
17 Well, on your view that would be just viewed as -- as if  
18 it were some kind of trivial amendment when it created  
19 half of anti-trust law. I mean, you see, that's the kind  
20 of problem I think --

21 MR. PHILLIPS: Well, no, I understand that, but  
22 the problem you still have, Justice Breyer, is that you've  
23 got to figure out how do you try to reconcile --

24 QUESTION: Well, we reconcile it by saying if  
25 it's a new -- you look at the act of Congress. An act of

1 Congress is called Public Law 3278 or whatever it is, and  
2 if prior to that act of Congress, you didn't have the  
3 cause of action, and if after you did, well, that's what  
4 they mean. It arises under a new act of Congress. That  
5 seems pretty simple.

6 MR. PHILLIPS: That's -- that's pretty simple,  
7 Justice Breyer, but it doesn't answer Justice Kennedy's  
8 question which is if you look at this particular act of  
9 Congress, which is codified in subsection (b), it doesn't  
10 give you any basis for a right of action. The  
11 infrastructure --

12 QUESTION: It doesn't give you any -- oh, now,  
13 now, all right --

14 MR. PHILLIPS: That definitional provision  
15 doesn't remotely --

16 QUESTION: -- that -- that -- if you're asking  
17 me the question, I'd answer that question by saying, of  
18 course, they intended a private right of action to apply.  
19 I mean, now let's go into the history of it and see  
20 whether they did or not.

21 MR. PHILLIPS: But, Justice Breyer, that's --

22 QUESTION: And I think -- I think that by the --  
23 but that's a different issue.

24 But in my way of thinking, that doesn't raise a  
25 serious question because I don't believe that they didn't

1 intend to raise -- to have this as a private right of  
2 action.

3 MR. PHILLIPS: But I still -- but that still  
4 doesn't answer what -- what strikes me as the fundamental  
5 question which is when Congress approached section 1981,  
6 did it think that it was, in fact, creating a whole new  
7 infrastructure cause of action or was it basically simply  
8 engrafting it back onto what section 1981 has been since  
9 1866.

10 QUESTION: It was engrafting it on and before  
11 they passed the act of Congress, you did not have this  
12 kind of cause of action, and after they wrote the new act,  
13 you did have it. Therefore --

14 MR. PHILLIPS: But -- but you -- but, Justice  
15 Breyer, you only have this cause of action because four --  
16 three of the four elements arise and existed long before  
17 1991, and those -- and that -- and it clearly has to arise  
18 under that portion of it as well. So the question is, if  
19 it arises under both, what's the right resolution of the  
20 question?

21 And the point that, it seems to me, that the  
22 petitioner and the United States have never responded to  
23 is why it you would adopt a rule that carries with it as  
24 much complication and complexity as the rule that they  
25 propose when you don't have to come out that --



1           QUESTION: I think their answer is, as I  
2 understand it, that is the approach that gives maximum  
3 effect to the new statutes of limitation that -- that  
4 Congress has enacted. Now, what -- what evidence is there  
5 that Congress wanted it to have maximum effect?

6           MR. PHILLIPS: There is no evidence that  
7 Congress wanted it to have maximum effect.

8           QUESTION: Well, except the fact they enacted  
9 the statute.

10          MR. PHILLIPS: The statute applies on a regular  
11 basis to almost everyday acts that Congress adopts in  
12 which they provide a cause of action and do not provide a  
13 statute of limitations. And that spares this Court and  
14 every other court the burden of having to borrow from  
15 State law, trying to figure out what analogous State law  
16 claims would be used as the basis for a statute of  
17 limitations.

18          QUESTION: One of the problems that troubles me  
19 about borrowing State law -- I've had a lot of experience  
20 in these cases -- that if you look at this statute under  
21 State law, I think the old cause of action that Patterson  
22 recognized would be a contract cause of action. And  
23 arguably, the one before us today is a tort action. So  
24 you'd probably have to follow the State tort law statute  
25 of limitations for half the case and the contract statute

1 of limitations for the other half of the case, after you  
2 figure out which State law applies. So you have this  
3 problem, even if you're referring back to State law, of  
4 maybe coming out with two different results.

5 MR. PHILLIPS: Except that I think, for the most  
6 part, the courts have pretty well resolved what they were  
7 going to do with respect to section 1981. I would have  
8 thought the problem --

9 QUESTION: Well, the section 1981 as construed  
10 in Patterson is clearly a contract claim.

11 MR. PHILLIPS: Right.

12 QUESTION: But as -- but this cause of action I  
13 don't think is clearly a contract claim.

14 MR. PHILLIPS: Well, it's difficult to know  
15 whether Congress meant to change that. I -- I don't  
16 disagree with that.

17 But I -- but it still seems to me the more  
18 fundamental problem in trying to sort out what Congress  
19 did with respect to section 1981 is that it never intended  
20 to make this into a brand new infrastructure. It took the  
21 existing four elements. It didn't change a single word in  
22 section 1981 when it implemented this cause of action. So  
23 the notion that this is a cause of action that arises only  
24 under the 1990 act is clearly -- under the 1991 act is  
25 clearly --

1                   QUESTION: How much -- how much trouble are we  
2 going to have in the future if -- if we adopted your --  
3 your theory? How -- you know, how am I to decide in the  
4 future whether a new cause of action arises all by itself  
5 or whether it -- it attaches to a greater or lesser degree  
6 to a preexisting statute? What's -- is it an easy test?

7                   MR. PHILLIPS: I -- I think every court that has  
8 adopted that test -- certainly the Seventh Circuit in this  
9 case and other courts of appeals have recognized that it  
10 is an infinitely simpler test than trying to figure out  
11 what arising under will mean in all of its various  
12 permutations and new statutes. All you have to look at is  
13 to see whether or not the cause -- the elements -- all the  
14 elements of the cause of action are newly created. That  
15 may be embodied in a -- in an amendment to an existing  
16 statute. It may be on a standalone basis. But I -- I  
17 submit to you that is a significantly simpler course to  
18 follow.

19                   And, indeed, I don't --

20                   QUESTION: But one thing that isn't simpler  
21 about it, Mr. Phillips, is the problem that Congress  
22 sought to cure with 1658, that is, you can have amazing  
23 diversity across the country if you're borrowing States'  
24 limits. For the same claim, it could be 2 years in one  
25 State, 3 years in another, 6 in another. Congress surely

1 wanted to cut out that disparity so that similarly  
2 situated people would have the same right to sue.

3 MR. PHILLIPS: On a prospective basis, there's  
4 no question about that, that the Congress had passed the  
5 Anti-terrorism Act that created a new cause of action, did  
6 not want the kind of inherent inequalities that arise  
7 under borrowing to go forward.

8 QUESTION: And that's suggesting that --

9 MR. PHILLIPS: It says nothing about what the  
10 Congress did retroactively.

11 QUESTION: -- that the old way is inherently  
12 complex because you have to figure out which would be the  
13 closest State limitation. And Congress just wanted to get  
14 away from that complexity. I don't know that that's --  
15 that that what was introduced is -- is more complex. It  
16 seems to me less so.

17 MR. PHILLIPS: Well, I -- Justice Ginsburg, your  
18 own hypotheticals suppose exactly how many complexities  
19 are going to arise, and I -- I can assure you that as --  
20 as much imagination as we've put into this, plaintiffs'  
21 counsels and defense counsel going forward will try even  
22 harder to end up fighting these issues in terms of the --  
23 in terms of complex this is.

24 All you have to do is look at the second  
25 certified class in this case. The district judge in this

1 case thought this was an easy statute to interpret and  
2 applied it to classes 1 and 3. When he got to class 2,  
3 what did he say? He said, with respect to those claims  
4 with regard to part-time employment, the parties are going  
5 to have to sort that out themselves. He made no attempt  
6 to sort -- to resolve that issue because it is a  
7 completely imponderable question under their  
8 interpretation of section 1658.

9 QUESTION: All right. Look -- look at your own  
10 interpretation. Answer this one if you can. I mean, I  
11 don't know. I'm just thinking about it. But Congress  
12 passes a new statute. It's called New, New, New.

13 (Laughter.)

14 QUESTION: And it's in a special code, title 78,  
15 just to be new. And it says this -- and this is total new  
16 and here is what it is. We have a Federal cause of action  
17 and a claim for double damages for anyone who has been  
18 injured by a robbery committed with a gun. And then it  
19 says, robbery shall be defined as it is defined in title  
20 18, section 391. And now, a gun -- that's new here, but  
21 we define that -- you see what I'm doing?

22 MR. PHILLIPS: Of course.

23 QUESTION: I'm just reproducing.

24 Now, how are you going to take that? Is that  
25 new, new, new?

1           MR. PHILLIPS: Of course, that's a new, new, new  
2 cause of action.

3           QUESTION: All right. Of course, it is.

4           MR. PHILLIPS: But --

5           QUESTION: Well, but it refers to the old one,  
6 you see.

7           MR. PHILLIPS: But, of course, that doesn't  
8 change --

9           QUESTION: We get three of the elements from --  
10 what?

11          MR. PHILLIPS: But that doesn't change anything,  
12 Justice Breyer. Of course, you can refer back to it. The  
13 question is are all of the elements of the cause of action  
14 independently provided for in the New, New, New statute,  
15 and the answer is yes.

16          QUESTION: But you can do it by a cross  
17 reference. In other words, in your view, if it's done to  
18 -- through a cross reference, they are still new, new,  
19 new, but it's done by a physical placement, it's old, old,  
20 old.

21          MR. PHILLIPS: No, I don't think it's that  
22 simple, Justice Breyer. If it's done where Congress means  
23 to create a new infrastructure and a new cause of action,  
24 it's new, new, new. When Congress does nothing more than  
25 engraft and doesn't even remotely modify the existing

1 infrastructure, it doesn't even so much as change the  
2 words of a statute that's been here from 1866, to suggest  
3 that this is a -- a suit that arises solely under -- under  
4 a 1991 amendment seems to me wrong.

5           The -- the other point I think it's important to  
6 make in this connection -- and -- and it's the rule of  
7 construction that seems to get lost sight of -- is -- and  
8 -- and it's the one this Court adopted in *Wilson v. Garcia*  
9 -- is that there is no reason to assume that Congress  
10 would mean for the -- to have two causes -- two statutes  
11 of limitation apply to the same cause of action when it  
12 was interpreting section 1983.

13           And here we have a situation where you will have  
14 two -- two statutes of limitation applying to the same  
15 words in the same subsection of a statute. And we raised  
16 the issue in our -- in our brief for the respondent  
17 saying, find us a statute where Congress has ever allowed  
18 that kind of morass to exist, and -- and the reply brief  
19 is utterly silent on that. And for good cause, because  
20 there is no reason to assume that Congress would have  
21 adopted that interpretation. And therefore, if you follow  
22 the rule of construction from *Wilson v. Garcia* and if you  
23 accept what I think you cannot help but except, which is  
24 that arising under is not an unambiguous line --

25           QUESTION: Do you think there may be an equal

1 protection problem there?

2 MR. PHILLIPS: Well --

3 QUESTION: When a person says, you know, I -- I  
4 can sue within 4 years. Somebody else can only sue within  
5 2 because I am -- I am an employee above 25 and -- and I  
6 only got my cause of action later. And -- and the one  
7 reason for the difference is my statute was enacted later  
8 than yours.

9 MR. PHILLIPS: Is it irrational? Yes. Is it  
10 unconstitutional? Probably not under the standards that  
11 loosely govern these kinds of issues unless somebody can  
12 attach it to some kind of --

13 QUESTION: Mr. Phillips, would this be a  
14 different case if instead of enacting the statute it did  
15 in 1991, they -- they simply had an amendment that said in  
16 addition to the coverage of the preexisting 1981, we will  
17 add the additional brand new cause of action which will  
18 allow recovery for what happens after you get on the job?

19 MR. PHILLIPS: I think if there were a 1981(d)  
20 that was -- that was separately contained and that  
21 expressed a clear indication from Congress that it really  
22 meant to create a new cause of action, that it would make  
23 sense under those circumstances for 1658 to apply to that  
24 particular situation.

25 But I think what we're talking about here is



1 simply trying to ascertain Congress' intent, and I think  
2 whether you look at it under section 1981's lens or if you  
3 look at it under section 1658's lens, you end up at  
4 exactly the same point.

5 QUESTION: But -- but your answer seems to me to  
6 suggest that if the statute has the same substantive  
7 effect, you get one result in one form of -- type of  
8 drafting and a different result with a different type of  
9 drafting.

10 MR. PHILLIPS: That's -- to be sure. And it  
11 goes back, I suppose, to the argument that was made by the  
12 other side which is that there's a default rule and  
13 Congress can always change it. The core of this is  
14 Congress can always make its intent more explicit in terms  
15 of how it deals with the problem. The question is, do you  
16 want to create a regime in which this Court is going to  
17 have to be resolving questions involving the meaning of  
18 section 1658 for the foreseeable future?

19 Or doesn't it make sense to recognize that there  
20 is, in fact, a -- a complete set of causes of action to  
21 which 1658 will routinely apply and that it will be spared  
22 -- the courts will be spared and the litigants will be  
23 spared the burden of having to sort out these kinds of  
24 issues on a going-forward basis and recognize that we're  
25 not going to pick up everything in the interim?

1           But as Congress wants to go forward and create  
2 new causes of action, the opportunity will arise, and it  
3 can do so. But if it chooses to engraft it on an existing  
4 infrastructure, then it seems to me under those  
5 circumstances, what the Court should do is say these cause  
6 of action arises at this point in time. It doesn't arise  
7 because of the new statute. It's a much simpler, much  
8 cleaner way of dealing with the issue.

9           And -- and that's the one point I did want to  
10 make. I don't -- I have not heard the other side remotely  
11 complain that our approach has any of the kinds of  
12 complications. I'm not saying it's without issues, but  
13 it's nowhere near the complications --

14           QUESTION: No, but it has the -- it has the  
15 complications that -- that preexisted in trying to figure  
16 out which State law applies and so forth and so on. It  
17 says that regime still survives in a lot of areas that it  
18 would not survive if you take their side.

19           MR. PHILLIPS: But -- but Congress clearly  
20 recognized that it was not prepared to eliminate that  
21 regime because -- because it would --

22           QUESTION: It seems to me that --

23           MR. PHILLIPS: -- would have created all kinds  
24 of problems on a retroactive basis. It didn't want to --  
25 it didn't want to unsettle expectations.

1           QUESTION: But it seems to me that to the extent  
2 you are changing that regime, you're -- you're bringing  
3 more certainty to the law because that is an inherently  
4 confusing regime.

5           MR. PHILLIPS: Well you bring one form of -- of  
6 complication and one form of -- of clarity to it. But at  
7 least the -- it's the clarity you know rather than the  
8 clarity you don't know -- or the confusion that you don't  
9 know at this point. Courts have been dealing with the  
10 question of how to borrow for a long time. The question  
11 of how you're going to deal with section 1658 and what  
12 conflicts in the circuits you're going to have to resolve  
13 and what happens when Congress makes minor modifications  
14 -- Congress makes lots of minor modifications in every --

15           QUESTION: Why -- why wouldn't all these  
16 problems exist with your system just as much if all that  
17 has to happen to make it valid under your system is we  
18 take these same words, making appropriate modification,  
19 stick them in title 75 and call it New, New, New? I mean,  
20 at that point we're going to have the same problem with  
21 the 15 versus the 25, wouldn't we? I mean --

22           MR. PHILLIPS: No, I don't -- I don't think so,  
23 Justice Breyer, because --

24           QUESTION: Why not? Because it would only apply  
25 to the 25, you see -- or the 15. It wouldn't apply to the

1 25.

2 MR. PHILLIPS: It will -- whatever the New, New,  
3 New statute is, that will subject to the -- to the statute  
4 of -- the 4-year statute of limitations.

5 QUESTION: That's right.

6 MR. PHILLIPS: There's no retroactivity issue  
7 you need to worry about in that --

8 QUESTION: No, but since it's the same language,  
9 you see we discover that small industry would be subject  
10 to the 4-year statute, but the larger firm would be  
11 subject to the old statute, just exactly what you're  
12 complaining about under their interpretation.

13 MR. PHILLIPS: But -- but if --

14 QUESTION: Am I wrong about that?

15 MR. PHILLIPS: I think you are wrong about that.  
16 I think all -- if Congress has created a new statute, it  
17 -- it has told you that this is one that's subject to --  
18 to the 4-year statute of limitations period on a going-  
19 forward basis, and I think it's eliminated any of the  
20 confusion.

21 And certainly Congress knows -- would know how  
22 to do that if the Court were very clear in saying what  
23 we're going to apply 1658 to is to new causes of action  
24 that are specifically stated with an entire infrastructure  
25 created to provide for them. I don't think they have to

1 do it in a new title 79 or whatever, but they clearly have  
2 to do it by doing more than simply changing the definition  
3 of a single set of terms in a statute that is otherwise  
4 left utterly unchanged under these circumstances.

5 If there are no other questions, Your Honors,  
6 I'd urge you to affirm.

7 QUESTION: Thank you, Mr. Phillips.

8 Mr. Newsom, we'll hear from you.

9 ORAL ARGUMENT OF KEVIN C. NEWSOM  
10 ON BEHALF OF THE FOR ALABAMA, ET AL.,  
11 AS AMICI CURIAE, SUPPORTING THE RESPONDENT

12 MR. NEWSOM: Mr. Chief Justice, and may it  
13 please the Court:

14 As perhaps the most frequent litigants in suits  
15 alleging violations of Federal law, the States and their  
16 officers have an overriding interest in this case in  
17 ensuring that section 1658 is construed to establish a  
18 clear and easily discernible rule.

19 That in my mind leaves two options. There are  
20 effectively two clear options on the table. One is to  
21 apply section 1658 to all section 1981 claims and the  
22 other is to -- is to continue the practice of applying  
23 State borrowed statutes of limitations to all of those  
24 claims.

25 Both of those rules create the same level of

1     certainty, but one of those rules, namely the -- the rule  
2     that would apply section 1658 to all section 1981 claims,  
3     is plainly inconsistent with Congress' intent and indeed  
4     with the language of section 1658 itself in that it would  
5     apply to claims that on any understanding arose under  
6     preexisting law. Accordingly, the State submits that the  
7     respondent's position here is the best among the available  
8     alternatives.

9             QUESTION: But, Mr. Newsom, the reason that  
10    Congress grandfathered the claims that already existed, as  
11    Mr. Phillips said, was because of expectations that I'm  
12    off the hook after 2 years, say. That -- that doesn't  
13    exist when a right is created, a right to relief, that  
14    didn't exist before.

15            MR. NEWSOM: Well, I think the -- the  
16    expectations that Congress sought to protect in -- in  
17    section 1658 were expectations with respect to certain  
18    categories of claims. In enacting section 1658 Congress  
19    recognized that there were certain categories of claims  
20    that had developed established limitations rules. For  
21    instance, under this Court's then-recent decisions in  
22    Wilson v. Garcia and Goodman v. Luken Steel, section 1983  
23    claims as a -- as a category and section 1981 claims as a  
24    category were both subject to single borrowed State  
25    statutes of limitations. So I think the expectation that

1 Congress sought to protect was the expectation of a  
2 litigant that I have a 1981 claim and it will be subject  
3 to the following statute of limitations.

4           So I think the -- that -- I mean, it sounds to  
5 me that there is agreement this morning that -- that the  
6 appropriate test to apply is the test whether or not  
7 Congress has created a new cause of action. I think the  
8 clearest evidence that Congress has done that, that  
9 Congress has created a new cause of action, is where  
10 Congress creates and enacts an entirely new, separate  
11 statutory section. And again, contrary to petitioners'  
12 suggestions -- and Justice Kennedy is quite right -- there  
13 are numerous times that Congress has, since December 1 of  
14 1990, created an entirely new and freestanding causes of  
15 action to which section 1658 would certainly apply.

16           Now, Congress' choice in the 1991 Civil Rights  
17 Act not to create a new statutory section and instead to  
18 -- to work within the four corners of section 1981 and to  
19 -- to fine tune the existing cause of action that already  
20 existed in section 1981 is a strong indication --

21           QUESTION: How can you say it's fine tuning an  
22 existing cause of action if the plaintiff couldn't have  
23 recovered before the 1991 amendment?

24           MR. NEWSOM: Well, I think the -- the key  
25 consideration here is that Congress had a choice in the

1 1991 act how it would respond to this Court's decision in  
2 Patterson. It was acting against a very specific  
3 backdrop.

4 QUESTION: Would you agree with Mr. Phillips if  
5 they'd written a different statute that came out with  
6 exactly the same result, but they just said -- it would  
7 not -- not redefine words but simply said, in addition to  
8 what you can already do you, you may also recover for what  
9 happens on the job?

10 MR. NEWSOM: I agree with Mr. Phillips, and  
11 having -- having just said that the strongest indication  
12 of Congress' intent to create a new cause of action would  
13 be its creation of an entirely new statutory scheme, I do  
14 agree that as -- as Congress moves away from that  
15 paradigm, that it may, for instance, in a freestanding  
16 section 1981(d), if it enacts all of the elements of a new  
17 -- of a new claim, that yes, indeed, that would create a  
18 new cause of action within -- within the meaning of  
19 section 1658.

20 QUESTION: But if it had done that, then we'd  
21 still have the same problems of deciding whether the -- a  
22 particular -- like class 2 in this case, whether they come  
23 under one section rather than the other. You'd have that  
24 problem then.

25 MR. NEWSOM: I'm not -- I'm not sure that that's



1 exactly right. The problem with class 2 -- and tell me if  
2 I'm misunderstanding. The problem with class 2 is that  
3 class 2 rises or falls on a given set of -- on a given set  
4 of facts. The district court did not conclude whether  
5 this class of -- this class of plaintiffs' promotion and  
6 assignment claims would succeed on a specific set of  
7 facts. The problem -- and that we think is the -- the  
8 problem inherent in petitioners' position that ties the  
9 question of whether a new cause of action has been created  
10 to the viability of a given claim rather than looking, as  
11 section -- as section 1658 directs the Court to do, what  
12 -- to -- to whether or not a civil action is created. A  
13 civil action in my mind speaks to your ticket into court,  
14 not so much with respect to what happens to you once you  
15 get there. So --

16 QUESTION: I -- I suppose any suggestion that we  
17 would be creating a -- a problem for Congress in giving it  
18 -- in posing a dilemma for it is that they can provide,  
19 number one, a new statute and have the statute of  
20 limitations set forth specifically.

21 MR. NEWSOM: Well, that's certainly true. Any  
22 -- I -- I certainly agree that any rule this Court adopts  
23 could be superseded by a subsequent amendment of -- of an  
24 enactment by Congress. But in the meantime, this Court we  
25 think ought to adopt a rule that minimizes confusion and

1 -- and maximizes certainty. That, in essence, is -- is  
2 the -- is the -- the proposition coming out of this  
3 Court's decision in Wilson v. Garcia, as Mr. Phillips  
4 said, which is that in that case, Justice O'Connor, for  
5 instance, made a very good point in her dissent that -- in  
6 that 1983 claims run the gamut from police brutality  
7 claims on the one hand to -- to school desegregation cases  
8 on the other and thought that it just didn't make sense to  
9 apply a single statute of limitations to such a wide  
10 variety of claims.

11 And this Court held -- and I submit correctly --  
12 that the practical considerations, those of maximizing  
13 certainty and minimizing litigation, required the  
14 enactment -- or the -- the imposition of a single  
15 categorical, some would surely say formalistic, statute of  
16 limitations. And the same practical considerations  
17 obtained here at least --

18 QUESTION: It's also true, is it not, that this  
19 is one of those unique cases in which the -- the 4-year  
20 rule will help some plaintiffs and help defendants in  
21 other cases because some of the State statutes for certain  
22 causes are actually longer than 4 years? So sometimes  
23 it's cutting it down and sometimes it's expanding it.

24 MR. NEWSOM: That's certainly right.

25 And the State's principal interest here is in --

1 is in a -- a clear statute of limitations, not necessarily  
2 the shortest statute of limitations. Our interest here is  
3 -- is principally in clarity.

4           So again, if I can just emphasize, Congress --  
5 Congress acted in section -- or rather in the 1991 act  
6 against a very specific backdrop, namely this Court's  
7 then-recent decision in Goodman v. Luken Steel, which held  
8 that a -- that a single borrowed State statute of  
9 limitations would apply to all section 1981 claims. Now,  
10 if Congress wanted to walk away from Goodman and create a  
11 new cause of action so as to trigger section 1658's 4-  
12 year statute, then our submission is then it had to be  
13 clear about what it was doing. It had to -- in the  
14 paradigmatic example, it had to create a new standalone  
15 section. At the very least, it had to create a -- a self-  
16 contained and freestanding civil action within the  
17 confines of section 1681. But where it merely defined the  
18 term in a preexisting cause of action, we submit that that  
19 is simply not clear enough to -- to apply the -- the 4-  
20 year statute.

21           If there are no further questions.

22           QUESTION: One other question, if I may. Are  
23 there other statutes like -- that have just made a  
24 substantive amendment merely by redefining a term? I  
25 think this is kind of a -- this is kind of an unusual

1 statute and it may be a very unusual problem we've got.

2 MR. NEWSOM: There may well be Justice Stevens.  
3 not that I'm aware of off the top of my head.

4 QUESTION: Thank you, Mr. Newsom.

5 Ms. Gorman, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF H. CANDACE GORMAN

7 ON BEHALF OF THE PETITIONERS

8 MS. GORMAN: Thank you, Mr. Chief Justice.

9 Justice Stevens, if I can answer your last  
10 question. Yes, there was another statute that I can think  
11 of and that's the Pregnancy Discrimination Act although  
12 this is before 1990. So the 1658 question doesn't come  
13 into play. But title VII was amended just to add that  
14 cause of action for pregnancy discrimination --

15 QUESTION: And did they do it -- did that  
16 statute do it just by redefining a term, redefining --

17 MS. GORMAN: Correct, Your Honor, by redefining  
18 discrimination based on sex to also include discrimination  
19 in pregnancy.

20 QUESTION: Yes. That was in response to our  
21 Gilbert case.

22 MS. GORMAN: Correct.

23 Your Honor, defendant raised two statutes that  
24 they -- that they could now point to that they said would  
25 benefit from section 1658. They pointed to the Muhammad

1 Ali Boxing Act and the anti-discrimination law. And I  
2 submit to this Court, as Justice Breyer said, those aren't  
3 going to be new acts either because if you look at those  
4 acts, they're actually amending previous acts, and they  
5 pull definitional terms out of previous acts from before  
6 1990.

7 If defendant's interpretation is accepted by  
8 this Court, then we are basically saying section 1658 is a  
9 nullity because we have scoured the statutes enacted by  
10 Congress after December 1st, 1990 and we could not find  
11 one statute that would benefit from section 1658, because  
12 Congress often takes terms or definitions or causes of  
13 action from previous statutes and amends, even when it  
14 thinks it's creating or it looks like it's creating  
15 something brand new.

16 QUESTION: I -- I don't know what you're saying  
17 when you say it takes it from them. Do you mean it just  
18 copies them in the new act? Are you counting situations  
19 in which they recite it in the new legislation?

20 MS. GORMAN: Correct, Your Honor, where they  
21 take --

22 QUESTION: Well, I don't think --

23 MS. GORMAN: -- terms out of the new -- out of  
24 old legislation.

25 QUESTION: I don't think your opponent would --

1 would count them. I -- I think only if -- if you rely  
2 upon the earlier statute for the definition, not if you  
3 simply copy that definition in the new statute, I don't  
4 think he would consider that to be covered.

5 MS. GORMAN: Well, Your Honor, if that's the  
6 case, then I think what respondent must be suggesting then  
7 is that section 1658 would only come into play if the new  
8 statute was the only statute you were relying on. And I  
9 don't think that's what section 1658 is stating. I think  
10 if -- even if this Court says, we're relying on old  
11 section 1981, as well as 1981 as amended by the Civil  
12 Rights -- Civil Rights Act, clearly our claim is still  
13 dependent on the 1991 act and therefore section 1658 would  
14 still come into play.

15 And as far as confusion, defendant suggested  
16 that there was even confusion in this case because the  
17 judge in our case did not know if class 2 claims were  
18 covered by this section 1658. There is no confusion with  
19 the court. It just wasn't briefed before the court.  
20 There was no record before the court because we had asked  
21 for a slightly different definition in our class  
22 certification, and the judge went beyond that definition  
23 and established a different class for the class 2. So the  
24 judge just didn't have the record and he thought we could  
25 figure that, which I think we probably could. And I think

1 the answer is going to be that the class 2 claims also  
2 fall under the 1658 statute.

3 The question before this Court is a narrow one:  
4 does section 1658 apply to plaintiffs' cause of action for  
5 racial discrimination and termination? Those claims were  
6 not created until the 1991 Civil Rights Act, and I submit  
7 to the Court that section 1658 should apply to those  
8 claims.

9 Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Gorman.  
11 The case is submitted.

12 (Whereupon, at 11:23 a.m., the case in the  
13 above-entitled matter was submitted.)  
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